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No. 91-1176

In The

Supreme Court of the United States

October Term, 1991

THE HONORABLE H. WILLIAM CONSTANGY,

Petitioner,

v.

NORTH CAROLINA CIVIL LIBERTIES UNION, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the issue of standing is properly presented in this court, since petitioner (a) failed to raise the issue in a timely manner, and (b) acquiesced in the uncontested assumption of standing by both courts below.

2. Whether respondents have shown the personal injury required for standing.

3. Whether in ruling that Judge Constangy's court-opening prayer violates the Establishment Clause, the court of appeals followed the applicable decisions of this Court.

4. Whether this Court should deny review because Judge Constangy's court-opening prayer fails any conceivable Establishment Clause test.

PARTIES

The North Carolina Civil Liberties Union is a party in this court and was a Plaintiff-Appellee below. The North Carolina Civil Liberties Union Legal Foundation was mistakenly denominated a party in the caption of the circuit court opinion. Appendix to Petition for Certiorari, at 1a. The circuit court has been requested to correct this clerical error.

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STATEMENT OF THE CASE

Judge Constangy's Answer pleaded that respondents "have failed to allege a case or controversy." J.A. 14.[1] Lack of standing was not thereafter asserted by Judge Constangy, by pleading or argument, until next asserted in the Petition for Certiorari. Respondents' Pre-Trial Brief expressly argued that respondents had standing. Docket No. 15. Judge Constangy's Brief in Opposition in the district court made no mention of standing. Docket No.

[1] "J.A." refers to the Joint Appendix on appeal.

26. In his Opening Statement, respondents' counsel stated:

> The two principal arguments which are presented are, first, whether the Plaintiffs [respondents] have standing, that is, whether they are appropriate persons to bring the case, and that matter will be entirely presented on written testimony, and I do not think it is controverted.

Tr. 6.[2] Judge Constangy's attorney made no mention of standing in his Opening Statement. Tr. 8-10. Eight days before trial respondents had served Partial Direct Testimony of each respondent. J.A. 91-108. This testimony was obviously directed at standing. At trial this testimony was admitted without objection. At each of the five separate offers, respondents' counsel characterized the testimony as having to do principally with standing. Tr. 11, 68-69, 76, 85. There was no impeachment or contradiction of this testimony. Standing was not mentioned in closing arguments. Judge Constangy's Opening Brief in the court of appeals raised no issue of standing. Respondent's Brief stated:

> Judge Constangy does not dispute that Plaintiffs have standing. Plaintiffs briefed the issue of standing in the district court, Dkt. No. 15, and Judge Constangy made no response.

Judge Constangy's Reply Brief took no issue with this representation.

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[2] "Tr." refers to the trial transcript.

STATEMENT OF FACTS

1. Facts as to Standing

Judge Constangy's Statement of Facts enlarges upon the findings of the courts below with numerous assertions of fact culled from the testimony and exhibits. Petition for Writ of Certiorari, at 3-5. Most of these culls relate to the issue of standing. Judge Constangy has asserted that business was conducted very casually in his courtroom, *id.*, and that he took no notice of the behavior of others during his prayer, *id.*, at 4-5. Judge Constangy later uses these assertions to argue that respondents therefore absent themselves gratuitously when he prays, and are mere "offended observers" who suffer no injury in fact. Petition, at 11.

There is substantial uncontradicted testimony that bears on the issue of standing, and it shows that respondents are injured in fact. Respondent Arundell testified without impeachment or contradiction that after hearing Judge Constangy's prayer for the first time, she thereafter sought to leave the courtroom whenever he entered to start a morning session. Unless she could exit before he entered, she remained, because she felt intimidated about walking out once he had entered. Shortly after he started opening court with prayer she told him, outside court, that she did not think it was appropriate. He said, "[T]hank you for letting me know." Respondents Samek and Everhart testified to the same effect. J.A. 93, 101-02. Respondents Howerton and Gronquist testified that they had on one occasion been present for the prayer, and on one or more occasions particularly avoided appearing

until the prayer was finished. Respondents Samek, Arundell and Everhart testified, without impeachment or contradiction:

> The time preceding and following the opening of court is often utilized by attorneys to discuss cases with the Assistant District Attorney and with police officers who are adverse witnesses, and to determine at calendar call (usually done by the Assistant District Attorney) which of one's clients are present. To the extent that I have been absent for periods of time before, during and after Judge Constangy's prayer, on account of his prayer, his prayer has interfered with my opportunity to handle my cases at that time. There is usually a line of attorneys waiting to talk to the Assistant District Attorney, and on occasion I have lost my place in line on account of leaving the courtroom to avoid being present for Judge Constangy's prayer. This has on occasion resulted in a delay in the handling of my cases.

J.A. 98, 102, 106. Each of these respondents was assigned by the Public Defender to attend Judge Constangy's court. J.A. 98, 101, 105.

Litigants in Judge Constangy's courtroom, many of whom are present under compulsion of legal process, have no realistic opportunity to escape hearing his prayer. No announcement is made that he will open court with prayer. His usual courtroom, which is typical of district courtrooms, has a center aisle, and the benches on either side seat 7 or 8 people. The courtroom is often full (150 people) at the beginning of a session. His prayer lasts 30 to 40 seconds. A person seated near the wall in the middle of the courtroom could hardly exit before the

prayer was finished, especially since most persons present bow their heads. If she did exit in time, she would then have no way of knowing when the prayer concluded, short of defeating her objective by listening to it at the door. If her case were called immediately after the prayer, she would be passed over and would then wait an hour or more until her case was recalled. If Judge Constangy were holding jury court, the objecting lawyer or litigant would have to make an unexplained and embarrassing exit and re-entry to avoid hearing the prayer. J.A. 62-64, 89, 112-21.

2. Facts as to Religious Purpose, Effect and Entanglement

Judge Constangy has asserted that his secular purpose in opening court with prayer was to "set the proper tone" so that there would be no "tricks and games" by the lawyers. Petition, p. 5. The district court expressly rejected this assertion and found to the contrary. Appendix to Petition, at 20a-21a. The circuit court expressly affirmed this finding. *Id.*, at 10a-11a. At his deposition Judge Constangy refused, until he was compelled by the district court, to answer whether he had a religious purpose in delivering his prayer. J.A. 129-31. He then denied having any religious purpose because he interpreted religious purpose to mean only having a purpose to proselytize. J.A. 132. He did then admit that religion could also appropriately be defined as "a person's relationship with God," but he continued to maintain that his prayer was not religious even if this definition were applied. J.A. 133-34. Finally, he agreed that one of his purposes in

delivering his prayer was "to express a reverence for God," but he still denied that this was a religious purpose. J.A. 135. He repeated this position at trial. J.A. 43-45. He was then presented with the prayer from *Engel v. Vitale*, 370 U.S. 421 (1962), and told that the Supreme Court had characterized this prayer as a religious activity. He persisted in testifying that his prayer, though not theologically distinguishable, was not religious. J.A. 44, line 19 through J.A. 50, line 25. This disingenuous testimony informed the district court's finding of fact that Judge Constangy had a religious purpose in delivering his prayer.

Judge Constangy admitted that numerous other courts establish a proper tone and atmosphere without being opened with prayer. J.A. 34-35. The circuit court found that the atmosphere in Judge Constangy's court was not different from that of other courtrooms. Appendix to Petition, at 11a. Judge Constangy does not open afternoon court with prayer, even though there is a completely new docket in the afternoon and in his view the normal court-opening invocation is not sufficient to create the proper tone and atmosphere. J.A. 113, 128-29.

Judge Constangy admitted that a Judge held a symbolic position and that when he prayed in court he did so as a governmental official. J.A. 155, 158. The individual respondents testified to serious religious objections to the prayer. Respondent Sarnek, a Jewish person, felt that the prayer sought to proselytize her away from her faith. Tr. 18. Respondent Arundell, a Christian, testified that she felt that public displays of religiosity were demeaning to her religious beliefs. Tr. 77. Respondent Everhart testified that the prayer promoted a concept of a patriarchal God

not shared by atheists, agnostics, and many world religions. He also objected to Judge Constangy calling on his God to intervene into respondent Everhart's personal life. J.A. 77-79.

REASONS FOR DENYING THE WRIT

Judge Constangy has improperly raised the issue of standing in this court, not having asserted it since filing Answer. He should be estopped from raising it now. If properly raised, it is meritless. Respondents, Assistant Public Defenders in Judge Constangy's court, are injured in fact by Judge Constangy's prayer. They have absented themselves from court during the prayer because of religious objections to it, and they thereby lost their position in line to discuss their cases with the Assistant District Attorney. The organizational respondent is injured in fact because its members are subject to being compelled to attend Judge Constangy's prayer.

The court of appeals applied well-established doctrine in concluding that Judge Constangy's prayer violated each of the three tests of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Petition should be denied even if the court contemplates reformulation of *Lemon*, because this case was correctly decided even under the proposed reformulations of *Lemon*. Judge Constangy's court-opening prayer is an endorsement of religion, and so offends Justice O'Connor's proposed reformulation in *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (O'Connor, J., concurring). It is coercive, there being no realistic opportunity to escape it, and so offends Justice Kennedy's proposed

reformulation in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part).

This case also presents no conflict with *Marsh v. Chambers*, 463 U.S. 783 (1983). There is only sparse and anecdotal history of opening courts with prayer. Opening court with prayer by a judge contaminates the neutrality of the court. A legislature is perceived as partisan, not neutral, so opening a legislature with prayer by a chaplain does not so strikingly identify it with religion.

I. THE ISSUE OF STANDING IS NOT PROPERLY PRESENTED IN THIS COURT BECAUSE JUDGE CONSTANGY (A) FAILED TO RAISE THE ISSUE IN A TIMELY MANNER AND (B) ACQUIESCED IN THE UNCONTESTED ASSUMPTION OF STANDING BY BOTH COURTS BELOW.

Standing is an aspect of justiciability and cannot be waived. *Valley Forge College v. Americans United*, 454 U.S. 464, 476 (1982). Standing may be raised for the first time in this court, *see, e.g., Princeton University v. Schmid*, 455 U.S. 100, 103 (1982), although typically that occurs in cases arising from the state courts, *id.; Doremus v. Board of Education*, 342 U.S. 429 (1952); and of course in original jurisdiction cases, *Wyoming v. Oklahoma*, ___ U.S. ___, 60 U.S.L.W. 4119 (U.S., January 22, 1992). In cases arising from federal courts a party may lose his right to challenge findings or assumptions of standing made by the courts below "when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation." *Steagald v.*

United States, 451 U.S. 204, 209 (1981) (lack of expectation of privacy not raised in Fourth Amendment case).

Respondents repeatedly asserted standing. Judge Constangy never asserted lack of standing in either court below, except perfunctorily in his Answer. Judge Constangy has secretly laid in wait, ever since filing his answer, and now seeks to ambush respondent. He should be estopped to do so. *Id.*

II. RESPONDENTS HAVE SHOWN THE PERSONAL INJURY REQUIRED FOR STANDING

Judge Constangy now having emerged from ambush, it appears that his gun is not loaded. Judge Constangy asserts that respondents are merely "offended observers" who do not suffer the injury in fact required for standing. Judge Constangy conveniently omits numerous pertinent facts bearing on the issue: that respondents are assigned to Judge Constangy's courtroom; that they are forced to leave a place that they have a right to be or delay going there because of his prayer; and that they lose their place in line to talk to the Assistant District Attorney on this account. That is injury in fact, traceable to Judge Constangy's conduct, redressable by injunction. *Valley Forge College v. Americans United*, 454 U.S. 464, 472 (1982).

The individual respondents have felt intimidated or offended by Judge Constangy's prayer. Members of the audience, including members of the respondent organization or other objectors, are essentially held captive for the duration of this prayer because there is no effective opportunity to exit nor realistic way to know when to return if one does manage to exit.

Court opens with a command to rise. Very shortly there follows a command to be seated. Judge Constangy then immediately says: "Let us pause for a moment of prayer." In context his words are coercive. One is judicially ordered to pause and observe his prayer. Respondents are compelled participants in his prayer.

The facts of this case are well within the ambit of numerous recent comparable cases in which this court has found standing without discussion of the issue. *See, e.g., Abington School District v. Schempp,* 374 U.S. 203 (1963); *Stone v. Graham,* 449 U.S. 39 (1980); *Lynch v. Donnelly,* 465 U.S. 668 (1984); *Wallace v. Jaffree,* 472 U.S. 38 (1985); *Edwards v. Aguillard,* 482 U.S. 578 (1987); *Allegheny County v. American Civil Liberties Union,* 492 U.S. 573 (1989). The present case is closest to, but even stronger than, *Abington*. There parents were given the option to have their children excused from religious exercises. Here children are subject to being compelled to attend Judge Constangy's court as witnesses, but given no realistic opportunity to leave.

III. IN RULING THAT JUDGE CONSTANGY'S COURT-OPENING PRAYER VIOLATES THE ESTABLISHMENT CLAUSE, THE COURT OF APPEALS FOLLOWED THE APPLICABLE DECISIONS OF THIS COURT.

In holding unconstitutional Judge Constangy's practice of opening the morning, but not the afternoon, sessions of his court with prayer, the court of appeals faithfully followed the line of decisions of this Court from *Engel v. Vitale,* 370 U.S. 421 (1962), through *County of*

Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989). The court of appeals held that Judge Constangy's courtroom prayer violates all three prongs of the Establishment Clause test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and correctly concluded that "the practice at issue in this case is clearly unconstitutional under all the tests and criteria developed by the Supreme Court in the Establishment Clause area." *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1152-53 (1991).

A. The Court of Appeals Fairly and Faithfully Followed the Decision in *Lemon* as Interpreted by this Court.

The court of appeals fairly applied the test of *Lemon v. Kurtzman* in a manner consistent with the subsequent decisions of this Court. Judge Constangy's characterization of the circuit court's application of a "super-*Lemon*" test is mere hyperbole and demonstrably false.

A practice that fails any prong of the *Lemon* test is unconstitutional. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). Judge Constangy's prayer fails all three prongs.

1. Judge Constangy's prayer fails the "secular purpose test" in fact and as a matter of law.

In ruling that Judge Constangy's prayer fails the "secular purpose test," the court of appeals upheld the district court's factual finding that the prayer was religious in nature and did not serve a secular purpose. 947 F.2d at 1150. The court below also noted that this Court's

decisions suggest "that an act so intrinsically religious as prayer cannot meet, or at least would have difficulty meeting, the secular purpose prong of the *Lemon* test." *Id.*, citing *Wallace v. Jaffree*, 472 U.S. 38 (1985), and *Stone v. Graham*, 449 U.S. 39 (1980). As this Court did in *Wallace* and *Stone*, the court of appeals held that the religious practice served no secular purpose despite a purportedly secular purpose advanced by the official. 947 F.2d at 1150.

The evidence at trial soundly supports the court of appeals' determination that Judge Constangy's prayer serves no secular purpose. While Judge Constangy contends that his primary purpose was to "produce a calm, quiet, serious atmosphere in the courtroom for the day," his actions belie his words. As the district court found:

> [J]udge Constangy recites his prayer only in the morning when he opens court, and not when he re-opens court in the afternoon. This practice demonstrates that the solemnity and dignity of the courtroom are not dependent upon the recitation of an opening prayer.

751 F. Supp. 552, 554 (W.D.N.C. 1990). The court of appeals noted that even though Judge Constangy heard different cases in the afternoon, there was no evidence of a difference between the morning and afternoon sessions with regard to the atmosphere or the level of noise in the courtroom. "Nor was the atmosphere in Judge Constangy's courtroom different from that of other courtrooms." 947 F.2d at 1150. In light of these facts, no secular purpose can justify Judge Constangy's practice of opening morning but not afternoon court by reciting a prayer.

This Court has rejected similar claims of secular purpose in numerous Establishment Clause cases. For example, in *Wallace v. Jaffree*, the Court held that an Alabama statute authorizing a minute of silence for "meditation or voluntary prayer" in public schools lacked any secular purpose. 472 U.S. at 56. In making its determination, the Court properly considered the statute's legislative history and the testimony of an Alabama legislator.

In *Stone v. Graham*, the Court rejected as clearly erroneous the trial court's finding that Kentucky's statute requiring the posting of the Ten Commandments on schoolroom walls had a secular purpose. The Court stated: "The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." 449 U.S. at 41.

Likewise, in *Edwards v. Aguillard*, the Court rejected Louisiana's assertion of the secular purpose of its law requiring that the public schools either not teach evolution or teach both evolution and "creation science." 482 U.S. at 593. Louisiana claimed that this law furthered the secular purpose of teaching both points of view on the subject. 482 U.S. at 586. Just as the Court concluded that the primary purpose of the Creationism Act was "to advance a particular religious belief," the court of appeals here concluded the primary purpose of Judge Constangy's prayer is to further his religious beliefs.

Judge Constangy's assertions of secular purpose are no more convincing than the fine print beneath the Ten

Commandments or Louisiana's disingenuous claim of academic freedom. The need for solemnity and dignity does not disappear after lunch.

The argument regarding secular purpose advanced in Judge Constangy's petition is disingenuous, if not misleading. The petition criticizes the district court and court of appeals for considering Judge Constangy's personal "subjective motivations" for opening court with prayer instead of the "objective purpose" of the prayer. Judge Constangy contends that his "otherwise unobjectionable practice" of courtroom prayer "does not become unconstitutional just because the actor happens to possess religious motivations." Petition, at 21. But Judge Constangy then abandons his focus on "objective purpose" and contends that his avowed secular purpose in opening court with prayer shields him from further scrutiny under the Establishment Clause. *Id.* at 22. Under any "objective" standard, prayer is a religious act, wholly lacking in secular purpose. An otherwise objectionable religious act, such as Judge Constangy's prayer, does not become constitutional just because the actor professes a lack of religious motivation.

In applying the secular purpose test, this Court distinguishes not between "objective" and "subjective," but rather asks " 'whether the government's *actual* purpose is to endorse or disapprove of religion.' " *Wallace v. Jaffree*, 472 U.S. at 56 (emphasis added and citation omitted). Thus, in Judge Constangy's language, the court of appeals' determination of no secular purpose was appropriately "objective" and "subjective." Recognizing that the "objective" purpose of prayer is "intrinsically religious," the court of appeals considered – and rejected – Judge Constangy's "subjective" contention that his

avowed personal purpose in praying somehow negates this "objective" religious purpose.

Under the ruling of the court below, Judge Constangy is free to hold any religious beliefs he chooses and to exercise those beliefs at all times, including while in the courtroom. The ruling below simply prevents him, as a governmental official, from engaging in a public, ceremonial act with a religious purpose.

2. Judge Constangy's prayer has the effect of endorsing religion.

The court of appeals also correctly applied the second *Lemon* test in concluding that "the primary effect of Judge Constangy's prayer was to advance and endorse religion." 947 F.2d at 1151. In so concluding, the court asked "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Id.* (quoting *Wallace v. Jaffree*, 472 U.S. at 56 n.42 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring))). Regardless of Judge Constangy's avowed purpose, his prayer unequivocally conveys a message of endorsement of religion.

Judge Constangy's petition mischaracterizes the ruling of the court of appeals and the findings of the district court on the issue of primary effect. Far from focusing solely on the atheistic cavils of a "sufficiently fastidious nonbeliever,"[3] the court of appeals and the district court

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[3] In light of his petition's strident denunciation of nonbelievers, one might question whether Judge Constangy

(Continued on following page)

carefully considered the effect of court-opening prayer on a reasonable person as well as on persons actualiy present in the courtroom and concluded that the prayer's primary effect was to endorse religion.

The court of appeals first considered the official nature and surroundings of Judge Constangy's prayer from the standpoint of the reasonable observer. "When a judge sits on the bench, says 'Let us pause for a moment of prayer,' and proceeds to recite a prayer in court, clearly the court is conveying a message of endorsement of religion." 947 F.2d at 1151. Judge Constangy is not merely accommodating religion, as do Sunday closing laws and military chaplains; he is affirmatively advancing it. When he prays to open court, Judge Constangy is the government itself affirmatively promoting religion. He is compelling others to worship in *his* religion.

Unlike the ceremonial deism of the phrase "In God We Trust" on coins or the announcement opening many courts, "God save the United States and this Honorable Court," the court below found that "prayer in the courtroom by a judge is a religious act with little historical support." 947 F.2d at 1151. Like the Supreme Court, the

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realizes that it is precisely the nonbeliever that the Establishment Clause exists to protect. The Court has held that the Establishment Clause means "no official preference even for religion over nonreligion." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 109 S. Ct. 3086, 3107 (1989) (citing *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, ___, 109 S. Ct. 890, 896 (1989)). It is "an established principle that the government must pursue a course of complete neutrality toward religion." *Wallace v. Jaffree*, 472 U.S. at 60.

court of appeals distinguished between the religious effect of prayer and deistic references that have lost their religious meaning. *Id. See County of Allegheny v. American Civil Liberties Union*, 492 U.S. at 602-03, 109 S. Ct. at 3106; *Lynch v. Donnelly*, 465 U.S. 668, 692-93 (O'Connor, J., concurring). Such a distinction flows naturally from the principle that a government official "may not engage in a practice that has the effect of endorsing religious beliefs," as determined by a "reasonable observer." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. at ___, 109 S. Ct. at 3115.

Contrary to Judge Constangy's contention, neither the court of appeals nor the district court based its determination of primary religious effect exclusively on the plaintiffs' trial testimony. The court of appeals simply cited testimony that the witnesses "felt that the judge wanted those present to pray with him and felt that the judge was endorsing religion." 947 F.2d at 1151. Such testimony supports, but is not the basis for, the conclusion that the primary effect of Judge Constangy's prayer is to endorse religion.

3. Judge Constangy's courtroom prayer excessively entangles government and religion by destroying the appearance of judicial neutrality.

The court of appeals held that Judge Constangy's court-opening prayer violates the third *Lemon* test of "excessive entanglement" because the ineluctable effect of such a daily prayer "is to inject religion into the

judicial process and destroy the appearance of neutrality." Excessive entanglement, the court reasoned, inevitably results from such "an ongoing, day-to-day merging of judicial and religious functions." 947 F.2d at 1152.

This holding fits squarely within the language and rationale of the "excessive entanglement" test as stated in *Lemon v. Kurtzman*: "the statute must not foster 'an excessive government entanglement *with religion*.' " 403 U.S. at 613 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)) (emphasis added). Judge Constangy flatly mistates this test when he argues that *Lemon* forbids excessive entanglement only between church and state, not between religion and state. This Court has never restricted the "excessive entanglement" test to relationships between the state and a church.

In *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), the Court invalidated a Massachusetts statute that gave churches the right to veto applications for liquor licenses from businesses located within 500 feet of the church. The Court held that this statute excessively entangled the government with religion because it violated the core rationale underlying the Establishment Clause, which is "preventing a 'fusion of governmental and religious functions.' " *Id.* at 127 (quoting *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963)). Judge Constangy's practice of prayer fuses government and religion at the most visible point of the court system.

Relying on the specific language and holding of *Lemon*, the court of appeals also noted "that Judge Constangy's prayer has the potential for entangling the state

in divisiveness along religious lines." 947 F.2d at 1152. In holding that prayer leading to such divisiveness may constitute another kind of entanglement, the court again quoted *Lemon*: "[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect." 403 U.S. at 622 (citation omitted).

While this Court often has considered religious divisiveness in the context of direct governmental subsidies to religious institutions, *Lynch v. Donnelly*, 465 U.S. at 684, its holding in *Larkin v. Grendel's Den* demonstrates that it may consider religious divisiveness engendered by other forms of governmental action. Thus Judge Constangy errs when he contends that state-sponsored religious divisiveness is relevant to an "excessive entanglement" inquiry only when the state provides direct subsidies to churches. To the contrary, as this Court stated in *Lynch v. Donnelly*: "Entanglement is a question of kind and degree." 465 U.S. at 684. There is no reason why the court should not consider potential political and religious divisiveness as part of the kind and degree of the entanglement present here.

Under the rationale of *Lemon*, *Larkin* and *Lynch*, Judge Constangy's courtroom prayer results in an excessive entanglement of government with religion. By opening his morning court sessions with prayer, Judge Constangy forfeits the appearance of neutrality that is central to our judicial system and entangles the state's administration of justice with the judge's personal religious views. That entanglement violates the Establishment Clause.

The court of appeals fairly and faithfully applied the three prongs of the *Lemon* test in holding that Judge

Constangy's courtroom prayer violated the Establishment Clause. Nothing in the court of appeals' application of the *Lemon* test or its ruling in the instant case would constitutionally prohibit Thanksgiving proclamations, the government's accommodation of persons who wish to observe religious holidays, or any religious practices previously permitted by this Court. Rather, the lower court's opinion is restricted to the facts of a particular courtroom prayer. Just as this Court has applied the *Lemon* test to prohibit prayer in the schoolroom, the court of appeals has applied it to invalidate Judge Constangy's prayer in the courtroom.

B. The Court of Appeals' Decision Does Not Conflict with this Court's Decision in *Marsh v. Chambers*.

In the singular case of *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court held that the Establishment Clause did not forbid the long-standing practice of the Nebraska legislature of paying a Presbyterian chaplain to open its sessions with prayer. The Court pointed out that the First Congress, three days before reaching final agreement on the language of the Bill of Rights, authorized the appointment of paid chaplains who opened its sessions with prayer. 463 U.S. at 789. Since that time, Congress has continued this practice without interruption, and most states have consistently followed the practice. 463 U.S. at 789-91. Relying on this "unambiguous and unbroken history of more than 200 years," 463 U.S. at 793, the Court concluded that legislative prayer was not a practice respecting an establishment of religion.

Unlike the legislative prayer permitted in *Marsh v. Chambers*, 463 U.S. 783 (1983), Judge Constangy's court-opening prayer lacks an unbroken 200-year historical tradition or explicit sanction by the framers of the Bill of Rights. Moreover, as the court of appeals noted, "it cannot be said that judicial prayer has no greater potential for an establishment of religion than legislative prayer." *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d at 1149. Thus the court of appeals correctly concluded that the Establishment Clause exception articulated in *Marsh v. Chambers* does not apply to Judge Constangy's court-opening prayer.

1. Court-opening prayer is not sanctioned by historical tradition.

The court of appeals distinguished legislative prayer from other unconstitutional official prayers because of legislative prayer's "unique history":

> The [*Marsh*] Court noted that sessions of Congress have opened with prayer for over two hundred years, and that the Nebraska legislature has opened with prayer for over one hundred years. Moreover, the Court found that in this case historical evidence shed light on the Framers' intent in drafting the Establishment Clause. In particular, the Court observed that the First Congress established the practice of opening Congress with prayer soon after the Constitution and the Establishment Clause were drafted.

North Carolina Civil Liberties Union v. Constangy, 947 F.2d at 1147. *See Marsh v. Chambers*, 463 U.S. at 789-93.

Later decisions of this Court emphasize the unique historical circumstances of legislative prayer in refusing to apply the *Marsh* rationale to other Establishment Clause cases.

> The *Lemon* test has been applied in all cases since its adoption in 1971, except in *Marsh v. Chambers* . . . , where the Court held that the Nebraska Legislature's practice of opening a session with prayer by a chaplain paid by the State did not violate the Establishment Clause. The Court based its conclusion in that case on the historical acceptance of the practice.

Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987). *See Lynch v. Donnelly*, 465 U.S. at 674 (Congress' authorization of legislative prayer contemporaneously with adoption of Bill of Rights was distinguishing feature in *Marsh*).

The Court also declined to apply the *Marsh* rationale on historical grounds in its most recent Establishment Clause decision, *County of Allegheny v. American Civil Liberties Union*. Writing for the Court, Justice Blackmun explained that "[i]n *Marsh*, the Court relied specifically on the fact that Congress authorized legislative prayer at the same time that it produced the Bill of Rights." 492 U.S. at 602, 109 S. Ct. at 3106.

Congress, however, has never authorized judicial prayer. "There is no evidence regarding the intent of the Framers of the Bill of Rights with regard to the opening of court with prayer." *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d at 1148. Moreover, there is no "unambiguous and unbroken history of more than 200 years" of opening either federal or North Carolina courts with prayer.

At trial, Judge Constangy offered no evidence or argument regarding a historical practice of opening court

with prayer. His evidence indicated only that three other North Carolina judges recently have opened their courts with prayer. Tr. 102-04; J.A. 187, 189, 193. As the court of appeals in the instant case stated, "a few examples of judges who open court with prayer is hardly comparable to the common practice of opening sessions of legislatures with prayer." 947 F.2d at 1149.[4]

In his petition to this Court, Judge Constangy cites a mere 13 instances of prayer, all in the Eastern Circuit Court, between the years of 1790 and 1800, and involving only five justices.[5] More than half of the instances he cites occurred before the ratification of the Bill of Rights. Judge Constangy cites no instance of prayer in any federal court after 1800. His archaic, anecdotal references to prayer in the earliest years of the circuit court prove neither historical precedent nor acceptance by the courts. Their scarcity proves the contrary. Whatever the colonial practice, there is no record of any federal court opening with prayer for almost 200 years.

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[4] North Carolina has seven supreme court justices, 12 court of appeals judges, 82 regular superior court judges and 164 regular district court judges, as well as various emergency and retired judges available for duty. N.C. Gen. Stat. §§ 7A-10, -16, -41-57. The practice of four North Carolina judges among more than 265 North Carolina judges is aberrational.

[5] Except for one instance with Justice Iredell and another with Justice Patterson, all instances of prayer occurred with Chief Justice Jay, Justice Cushing or Justice Wilson. Thus there is no record of prayer in the circuit courts of Justice Blair (1789-96), Justice Rutledge (1789-91), Chief Justice Ellsworth (1795-1801), Justice Chase (1796-1811) or Justice Moore (1799-1804). *See The Documentary History of the Supreme Court of the United States, 1789-1800,* Vol. II.

Thus the district court and the court of appeals properly limited the exceptional case of *Marsh v. Chambers* to legislative prayer as an instance of long-standing historical acceptance. Court-opening prayer has no similar "unambiguous and unbroken" history. On historical grounds alone, the holding of *Marsh* is inapplicable to the instant case.

2. Court-opening prayer has far greater potential for establishment of religion than legislative prayer.

The court below also properly declined to apply the holding in *Marsh* because judicial prayer has "greater potential for an establishment of religion than legislative prayer." 947 F.2d at 1149. Indeed, the circumstances surrounding Judge Constangy's court-opening prayer are fundamentally coercive.

Court-opening prayer is inherently coercive. As the court of appeals explained, the potentially coercive quality of courtroom prayer differs markedly from a chaplain opening legislative sessions with prayer. Legislators primarily direct legislative prayer "at the legislators themselves, who have decided to have prayer." *Id.* Such legislative prayer does not urge citizens or litigants to engage in religious practices, as a majority of this Court stated in *Allegheny*, "and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct." 492 U.S. at 603 n. 52.

In striking contrast to legislative prayer, Judge Constangy directs his courtroom prayer "not to fellow consenting judges but to the litigants and their attorneys." 947 F.2d at 1149. Unlike legislators, who are free to leave or object to the prayer, litigants and attorneys in Judge Constangy's courtroom have no realistic opportunity to escape hearing his prayer. The courtroom is often full at the beginning of a session. Judge Constangy's prayer lasts 30 to 40 seconds. A litigant seated in the middle of the courtroom could hardly exit before the prayer was finished, especially since most persons present bow their heads. If the litigant's or witness' case were called immediately after the prayer, he or she would be passed over and would then wait an hour or more until the case was recalled. Moreover, Judge Constangy frequently holds criminal district court, where many litigants and witnesses, including children, are compelled to be present under court order or subpoena. J.A. 62-64, 89, 112-21. Would a criminal defendant free on bond feel at liberty to exit when the prayer began and then re-enter after the prayer (when Judge Constangy has his eyes open)?

The exigencies of criminal court practice also require attorneys in Judge Constangy's court to be present during his prayer. Each individual plaintiff testified without rebuttal that the time preceding and following the court-opening prayer is often utilized by attorneys to discuss cases with the assistant district attorney and police officers, and to determine the presence of their clients. Absenting oneself from Judge Constangy's prayer interferes with an attorney's ability to handle cases and on occasion results in delays. J.A. 98, 102, 106.

Judge Constangy thus compels the litigants and attorneys who appear before him to worship his God, just as if he were compelling them to attend church. They may silently object, or a few lawyers may exit the courtroom, but all others are effectively forced to participate in his form of worship. Even those who leave are forced to acknowledge his prayer by their leaving. No one is literally forced to kneel in prayer, but the message is implicit in the scene that one should bow the head and pray to Judge Constangy's God.

Legislatures function as political bodies, openly and properly so. Their practices are perceived to be responsive to majority will. "Most importantly, unlike judges, legislators do not have an obligation to be neutral. A legislature is by its very nature partisan and political." 947 F.2d at 1149. The partisan, political, activist duties of legislators pointedly distinguish them from judges, who must be neutral and reactive.

That profound distinction between courts and legislatures and the particular coercive circumstances of Judge Constangy's practice compel the conclusion of the court below: "Because a judge must be a neutral decision-maker, prayer in court by a judge has far more potential for establishing religion than legislative prayer." *Id.* Thus even ignoring its unique requirement of long-standing historical acceptance, *Marsh* does not validate the public prayer in the instant case. The court of appeals' decision is consistent not only with this Court's 30-year history of Establishment Clause decisions, but with the decision in *Marsh*.[6]

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[6] Judge Constangy cannot be serious in contending that the Establishment Clause applies only to acts of Congress.

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IV. THIS COURT SHOULD DENY REVIEW BECAUSE JUDGE CONSTANGY'S COURT-OPENING PRAYER FAILS ANY CONCEIVABLE ESTABLISHMENT CLAUSE TEST.

Judge Constangy's court-opening prayer is a purely religious act by a public official in the coercive environment of a state criminal district courtroom, which must be open and neutral. His prayer thus fails not only the *Lemon* test, but any conceivable Establishment Clause test. Because the prayer would violate any actual or conceivable Establishment Clause standard, this Court need not review the lower court's decision, nor should it delay denial of the petition until it has decided the case of *Lee v. Weisman*, U.S. No. 90-1014.

The court of appeals recognized that Judge Constangy's prayer was unconstitutional under any formulation when it stated that "the practice at issue in this case is clearly unconstitutional under all the tests and criteria

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Petition for Writ of Certiorari, at p. 20. That contention contravenes dozens of Supreme Court decisions. This Court has applied the First Amendment to actions by state governments since 1925, *Gitlow v. New York*, 268 U.S. 652, 666 (1925), and first applied the Establishment Clause to state and municipal action in 1947, *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947). For more than 60 years, this Court often has held that state and local governmental actions – including actions of the courts – violate the First Amendment. *E.g., County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989) (county's religious practice violates Establishment Clause); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (state court's application of state rule of law violates free press clause).

developed by the Supreme Court in the Establishment Clause area." 947 F.2d at 1152-53.

Even under the standard proposed in Justice Kennedy's dissenting opinion in *Allegheny County v. American Civil Liberties Union*, Judge Constangy's prayer clearly violates the Establishment Clause. Justice Kennedy's opinion identifies two absolute prohibitions under the Establishment Clause: "government may not coerce anyone to support or participate in any religion or its exercise," and government may not directly benefit religion. 492 U.S. at ___, 109 S. Ct. at 3136. Under his formulation, coercive religious practices are always unconstitutional. Like the school prayer in *Engel v. Vitale*, Judge Constangy's prayer is inherently coercive; hence no further inquiry is required under Justice Kennedy's formulation. 492 U.S. at ___, 109 S. Ct. at 3137 n.1 (Kennedy, J., concurring in part and dissenting in part).

Likewise, Judge Constangy's prayer violates the "endorsement test" first suggested by Justice O'Connor in her concurrence in *Lynch v. Donnelly*. Under Justice O'Connor's analysis, "government endorsement or disapproval of religion" violates the Establishment Clause because "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." 465 U.S. at 688 (O'Connor, J., concurring). Applying this standard, Justice O'Connor concluded that Pawtuckett's Christmas display, including both secular symbols and a creche, in a privately owned park was not constitutionally objectionable, but that placement of a nativity scene in the lobby of the Allegheny County

Courthouse "has the unconstitutional effect of conveying a government endorsement of Christianity." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. at ___, 109 S. Ct. at 3119 (O'Connor, J., concurring). She stated that the display of a religious symbol in a *courthouse* "runs a special risk of 'mak[ing] religion relevant, in reality or public perception, to status in the political community.' " *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. at 692 (O'Connor, J., concurring)).

Judge Constangy's religious act of prayer – in a courtroom where citizens and attorneys are compelled to attend – creates an untenable risk of making religion relevant, whether in the reality of a nonbelieving criminal defendant who feels compelled to join in prayer, or in the perception of a public that may doubt the court's neutrality. In the context of the courtroom, Judge Constangy's prayer is an overt and unconstitutional endorsement of religion.

Like state-sponsored prayer in the public schools, Judge Constangy's court-opening prayer violates all three *Lemon* tests, the prohibition against coercion or proselytizing theorized by Justice Kennedy, and the endorsement test proposed by Justice O'Connor. Such prayer, therefore, fails any test imposed or suggested by this Court for determining a violation of the Establishment Clause.

Respectfully submitted, this 24th day of February, 1992.

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